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October 29, 2018

**By Email (through Claims Administrator Orran Brown)**

Honorable Anita B. Brody  
United States District Court  
Eastern District of Pennsylvania  
James A. Byrne U.S. Courthouse  
601 Market Street, Room 7613  
Philadelphia, PA 19106

*In re: Nat'l Football League Players' Concussion Injury Litig., No. 12-md-2323-AB*

Dear Judge Brody:

The NFL Parties respectfully seek a brief stay of payment on 17 claim awards that are the subject of two critically important appeals to this Court—one filed today and the other to be filed next week.

These appeals, discussed with the Court several months ago, raise fundamental issues concerning the proper implementation of the Settlement Program that have highly significant implications for the future. The appeals effectively will be mooted, however, if the claims are paid before the Court has ruled. Under the schedule set by the Special Masters, both appeals will be fully briefed within three weeks. As such, the

requested stay will be short, and the potential prejudice to the NFL Parties if the stay is not granted far outweighs the potential prejudice to Claimants if it is. Absent a stay, these 17 claims would be paid within the next two weeks.<sup>1</sup>

The subjects of the appeals go to the heart of the Parties' Settlement Agreement. In the appeal filed today, the NFL Parties seek reversal of the Special Master's Ruling Regarding the Use of the Appeals Advisory Panel on Claim Appeals (*see* Exhibit 1). In that appeal, the NFL Parties demonstrate that the Special Master's consistent failure to consult with AAP Members and Consultants ("AAPs" and "AAPCs") on appeals turning on technical medical issues where the Qualifying Diagnoses were rendered by Qualified MAF Physicians ("MAF Physicians")—despite an express provision in the Settlement Agreement permitting such consultation—constituted an abuse of discretion with respect to 17 specific claim appeals. Each of these Qualifying Diagnoses were rendered by MAF Physicians who subsequently were *terminated* from the Settlement Program by the Claims Administrator and/or severely *criticized by AAP members* (in connection with audits) for repeatedly employing suspect methodologies and reaching flawed diagnoses, including with respect to the *very same diagnostic issues* raised by the NFL Parties on these appeals. This creates a compelling argument for AAP/AAPC consultation.

In fact, the Special Master has failed to consult with an AAP or AAPC on 36 of 37 adjudicated appeals that the NFL Parties have brought with respect to Qualifying Diagnoses rendered by MAF Physicians, including each of the 17 diagnoses subject to today's appeals. The NFL Parties respectfully submit that this pattern and practice of ignoring the availability of expert AAP/AAPC advice, by definition, constitutes an abuse of discretion. MAF Physicians are not infallible, even though they were mutually approved by the Parties. The short history of the Settlement Program—and the termination and/or AAP criticism of the four MAF Physicians at issue here—proves this.

It is critical to understand that, because these are appeals from MAF Physician diagnoses, there has been no prior AAP/AAPC review at any time. Therefore, the only possibility for neutral medical evaluation of the technical medical issues raised by these diagnoses is if the Special Master consults with an AAP/AAPC in connection with an appeal. This is especially vital here, where the Special Master was specifically made aware that AAPs/AAPCs had raised serious concerns and criticisms of these specific MAF Physicians and their work. We submit that the Special Master's failure to consult with an AAP/AAPC on the technical medical issues raised in *any* of these 17 appeals (and his rejection of the NFL Parties' request that he reconsider these appeals with AAP/AAPC assistance) in the face of these clear red flags regarding the performance of the MAF

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<sup>1</sup> The two appeals cover more than these 17 claims, and certain claims are subject to both appeals, but the NFL Parties currently seek a stay only with respect to the 17 claims that are otherwise subject to prompt payment before the Court has an opportunity to rule on the appeals.



Physicians in question is a textbook case of abuse of discretion. The importance of this issue alone more than justifies a brief stay.

The NFL Parties' second appeal—to be filed on or before November 7 (*i.e.*, next week)—further supports a stay. Our second appeal concerns whether a retired player who took the BAP neuropsychological testing battery and clearly would not receive a Qualifying Diagnosis under the Parties' agreed-upon BAP diagnostic criteria if the player participated in the *free* BAP baseline assessment program may nonetheless receive a Qualifying Diagnosis by *paying* to see a MAF Physician who applies more relaxed and forgiving diagnostic criteria to *the very same testing*. We think the answer is self-evidently “no” and that the Settlement Agreement cannot and should not be construed to permit this utterly nonsensical and unfair result.

The Special Master nevertheless has erroneously interpreted the “generally consistent” language in the Settlement Agreement to permit just that. This language cannot fairly be read to suggest that identically situated retired players who take the exact same BAP testing battery can receive diametrically opposed outcomes depending upon whether they saw a BAP Provider or MAF Physician or had the ability to essentially “pay” for more favorable (*i.e.*, watered down) diagnostic criteria.<sup>2</sup> The very idea is anathema to the design of the Settlement Program. Indeed, the Settlement Program was specifically designed to ensure that all retired players are placed on an equal footing whether evaluated inside or outside of the BAP. The “generally consistent” provision with respect to diagnoses received outside of the BAP cannot reasonably be interpreted to permit this patently inconsistent and therefore unfair result.

The NFL Parties anticipate that this “generally consistent” appeal will cover at least eight appeal determinations, certain of which are not also subject to the appeal filed today and described above regarding AAP consultation (or otherwise not subject to payment due to ongoing audit). Under the schedule issued by the Special Masters, briefing on the “generally consistent” appeal will be complete by November 21.

\* \* \* \*

Either one of these appeals justifies a brief stay; together, they create a compelling predicate for a stay. Payment of the claims subject to these appeals prior to the time the Court may hear and decide them would essentially moot the appeals and greatly prejudice the NFL Parties by forcing payment of tens of millions of dollars that cannot easily be recovered in the event the Court determines that the Special Master erred. The NFL Parties made every effort to bring these issues to the Court when they first arose and have acted expeditiously, pursuant to the schedule directed by the Court and the Special

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<sup>2</sup> Indeed, most neurologists in the Settlement Program are both BAP Providers and MAF Physicians, and thus when a retired player pays for an examination by a MAF Physician, most of the time he is paying for the very same doctor to simply switch hats in hopes that he may apply more lenient criteria.

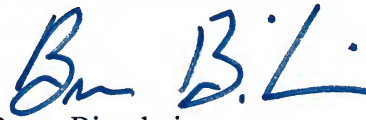
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Master, to bring them to the Court for review. A stay imposes no meaningful prejudice on Claimants, given that both appeals will be fully briefed in three-weeks' time.

The NFL Parties respectfully request that the Court enter a brief stay of payment of the 17 claims subject to these two appeals that otherwise would be paid within the next two weeks until the Court may hear and resolve the critically important issues the appeals present.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bm B.L.", is written over the typed name.

Bruce Birenboim

cc: Brad S. Karp, Esq.  
Chris Seeger, Esq.  
Special Master Jo-Ann Verrier, Esq.  
Special Master Wendell Pritchett, Esq.

Honorable Anita B. Brody

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**APPENDIX**

**List of Claimants' Settlement Program IDs ("SPIDs")  
For Whom the NFL Parties Seek a Stay of Payment of Monetary Awards**

SPID 100000070  
SPID 100002497  
SPID 100002712  
SPID 100003221  
SPID 100004486  
SPID 100004715  
SPID 100004758  
SPID 100005721  
SPID 100005741  
SPID 100006765  
SPID 100009422  
SPID 100013190  
SPID 100016955  
SPID 250002398  
SPID 950000043  
SPID 950000215  
SPID 950003710